United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,743

UNITED STATES OF AMERICA,

Appellee,

vs.

LONNIE E. BARNES,

Appellant.

Appeal from the United States District Court

for the District of Columbia

BRIEF FOR APPELLANT

May 6, 1970

PHILIP F. HUDOCK
Counsel for Appellant
(Appointed by this Court)

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* Cases chiefly relied upon are marked by an asterisk.

STATUTES AND RULES

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UNITED STATES OF AMERICA,

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BRIEF FOR APPELLANT

I. QUESTIONS PRESENTED*

A. Did the trial court err in admitting testimony concerning identification of the Appellants by the complaining witness?

B. Should the indictment be dismissed because the Appellant was not represented by counsel at arraignment?

C. Should the indictment be dismissed because the Complaint was not properly executed?

References to Rulings

Ruling of Judge Gesell, August 26, 1969, Tr. 35.

*This case has not previously been before this Court.

II. STATEMENT OF THE CASE

A. Proceedings Prior to Appeal

This appeal is from the conviction of Appellant, Lonnie E. Barnes, for armed robbery (22 D. C. Code §§2901) and 3202) and assault with a dangerous weapon (22 D. C. Code §502) arising from an occurrence on January 10, 1969. The Appellant and two others[1/] were arrested without a warrant a few minutes after the robbery and have been incarcerated since January 10, 1969. Subsequently, the complaint was filed (after execution before a deputy clerk).

An indictment for armed robbery, robbery, and assault with a dangerous weapon was returned. Appellant was arraigned on March 7, 1969, before Chief Judge Curran without representation by counsel. A plea of not guilty was entered, and the Court referred Appellant's case for appointment of counsel under the Criminal Justice Act of 1964.

On April 21, 1969, Appellant filed a pro se motion to dismiss the indictment. On May 1, 1969, Judge Curran (without an opinion) denied Appellant's motion.

The Appellant was tried on August 26-28, 1969, before Judge Oliver Gasch and a jury.[2/] Prior to the trial Judge Gasch heard testimony outside of the presence of the jury from the complaining witness concerning the identification of the Appellant (and his two co-appellants). The Court denied a defense motion to rule the identification inadmissible.[3/]

1/ Arrested with Appellant Barnes were Clement Stratford and Franklin F. Foss. All three were tried together and convicted. Stratford's appeal (No. 23,742) and Foss's appeal (No. 23,744) are also before this Court and all three appeals will be argued together.

2/ Trial counsel for Appellant was Charles W. Bills, Esquire, present counsel was appointed by this Court for appeal.

3/ The defense relied on Stovall v. Denno, 388 U. S. 293 (1967) and United States v. Wade, 388 U. S. 218 (1967).

In the trial that followed, Appellant was convicted of armed robbery and assault with a dangerous weapon. Judge Gasch sentenced the Appellant to three to ten years on both counts (sentences to be served concurrently). A timely notice of appeal was filed; the Appellant remains incarcerated.

B. Statement of the Facts

On Friday, January 10, 1969, at 10:00 a.m., Glen Wagner was leaving the public restroom near the main public library at 8th and K Streets, N. W., when he was approached by three men who demanded money (Tr. 42-43). The men took from Mr. Wagner a billfold and $14.00, a change purse and $1.15, a watch, a brown jacket and a blue three-quarter length coat (Tr. 44-45). One of the three men held a knife on Mr. Wagner (Tr. 45). During the robbery the assailants pulled off and broke Mr. Wagner's bifocal glasses (Tr. 45).

After the three men left, Mr. Wagner went into the library and asked a guard to call the police (Tr. 46). Sergeant Hiram Kirby of the Metropolitan Police arrived within a few minutes, and Mr. Wagner related the events of the robbery (Tr. 47, 87-88).

Shortly after 10:00 a.m. on January 10, 1969, Officer Donald L. Beach of the Metropolitan Police Department noticed three men at 8th and I Streets, N. W., struggling over two coats and some other unidentified items (Tr. 106-7). The officer stopped the men and questioned them about the ownership of the coats; the three said they owned the coats (Tr. 107). Officer Beach then heard a radio broadcast of a robbery at 9th and Massachusetts by three Negro males (Tr. 107, 121). The officer left the three men and responded to the call (Tr. 107).

At the robbery scene, Officer Beach inquired of the Complainant and the other police present if any coats had been taken. Officer Beach was informed that two coats were taken, and he returned to find the three men. They were located at 5th and I Streets, N. W. (Tr. 108).

Mr. Wagner was taken by Sergeant Kirby to 5th and I Streets and identified the three men from the moving scout car and at a distance of 75 to 100 feet; Mr. Wagner noted that one of the three had on his coat (Tr. 89). The three men stopped and identified were Appellant Barnes and co-appellants Stratford and Foss (Tr. 111). Foss is white; Barnes and Stratford are Negroes. Officer Beach arrested the three (Ibid.).

Officer Beach recovered from the Appellants the following (although on cross-examination he was not sure what came from whom; Tr. 111-13, 127):

Barnes

Brown coat (held on arm)
Change purse (containing about $1.50 in change and one dollar bill)

Foss

Pocket knife
Wallet (containing $12.00 and Mr. Wagner's ID)

Stratford

Omega wristwatch (in pocket)
One dollar bill
Blue coat (being worn)

At the trial the complaining witness, Mr. Wagner, related the events of the robbery and identified the three Appellants. Foss was singled out as the one who held the knife. Sergeant Kirby and Officer Beach testified concerning their investigation

and the identification by Mr. Wagner.

All three Appellants took the stand. Barnes and Stratford testified that they were walking together (but not with Foss) when stopped by Officer Beach (Tr. 138-39). The two identified themselves and Officer Beach returned to his scout car. The Officer then proceeded slowly along I Street in his car and at all times was within sight of Barnes and Stratford. Officer Beach then stopped Foss who was walking separately and later stopped Barnes and Stratford a second time as they walked by (Tr. 139, 171-72, 193).

The Appellants denied having any of Mr. Wagner's property (Tr. 142-43, 180, 194). The three testified that when Mr. Wagner arrived at 5th and I streets in the scout car he appeared intoxicated and was held up by two policemen (Tr. 161). The three also testified that Mr. Wagner was wearing both his brown jacket and blue coat while identifying the suspects at 5th and I Streets (Tr. 165, 182, 205).

Appellant Stratford produced his personal property inventory from the Department of Correction which showed he had a gray coat and $20 in cash when arrested on January 10, 1969 (Tr. 145-46). Appellant Barnes introduced a slip showing $90.00 in an account at the time of the robbery (Tr. 175).

Appellant Foss testified that he had been assaulted by Officer Beach a week prior to the robbery arrest and had a second encounter with the officer five days before the January 10 arrest (197-98, 200).

III. SUMMARY OF ARGUMENT

Appellant Barnes and his two co-appellants were identified on a street a few minutes after the 10:00 a.m. Friday robbery by the complaining witness. The three were identified while surrounded by police and while one was allegedly wearing a coat owned by the complainant. The procedure followed by the police was highly suggestive and in violation of due process of law. Foster v. California, 394 U. S. 440 (1969). There is no reason why a lineup could not be promptly held. Counsel or a substitute counsel could have been readily obtained at 10:00 a.m. on a Friday. The complaining witness was readily available to view a lineup. A fair lineup procedure could have been established as far as participants and garments were concerned.

The Appellants were not represented by counsel at their arraignment. Under United States v. Ridley, 412 F2d 1126 (D. C. Cir. 1969) this would appear to be a violation of the Sixth Amendment and Rule 44(a) Fed R. Crim. P.--without the necessity of showing actual prejudice.

The Complaint was executed before a deputy clerk of the Court in violation of Rule 3, Fed. R. Crim. P. and 18 U. S. C. §3041. This Court in Gaither v. United States, 413 F2d 1061, 1076 (D. C. Cir. 1969) found this violation to be harmless error in a warrantless arrest. Appellants contend that a properly executed complaint is an essential element of the judicial process in all arrests and Rule 3 should not be applied only to arrests pursuant to a warrant.

IV. ARGUMENT

A. The identification of the Appellant was by a suggestive procedure in violation of due process of law--there should be a remand for a new trial (Tr. 9-35, 96)

Approximately ten minutes after being robbed by three men at 10:00 a.m. on Friday, January 10, 1969, the Complainant, Glen Wagner, was driven in a scout car from 8th and K Streets, N. W., to 5th and I Streets (Tr. 18-19). Mr. Wagner knew he was being taken by the police to see some suspects (Tr. 19). When the scout car was 100 feet from the suspects (and still moving), Mr. Wagner identified three men as his assailants--noting one had on his blue coat (Tr. 19-20, 96). The three were the Appellants Barnes, Stratford and Foss (Tr. 23).

Prior to the trial, counsel for the Appellants raised the identification issue and the Court granted a hearing, outside of the presence of the jury, to determine if the identification was impermissibly suggestive (Tr. 3, 6, 9). At the hearing, only the complainant, Mr. Wagner, testified.

The question of identification of a defendant has been ruled on by the United States Supreme Court in United States v. Wade, 388 U. S. 218 (1967), Gilbert v. California, 388 U. S. 263 (1967), Stovall v. Denno, 388 U. S. 293 (1967), and Foster v. California, 394 U. S. 440 (1969). In Wade The Supreme Court held that because of the possibility of unfairness to the accused in the way a lineup is conducted, a lineup is a "critical stage" in the prosecution, at which the accused must be given the opportunity to be represented by counsel, 388 U. S. at 237.

Of course, the Appellants did not have counsel when they were identified by the victim on the street a few minutes after the crime. The question is whether the Wade rule pursuant to the Sixth Amendment applies to prompt confrontations with an eye-witness near the scene of the crime.

This Court has considered the application of Wade to on-the-scene identifications in Russell v. United States, 408 F2d 1280 (D. C. Cir. 1969), cert. denied 395 U. S. 928. After discussing Wade, this Court held that on-the-scene identifications are not within the Wade rule (408 F2d at 1283-84):

> "While the language of Wade would thus seem to encompass prompt on-the-scene identifications, they do not fall within the holdings of Wade or its companion case, Gilbert v. California. The confrontations disapproved in these cases were post-indictment lineups. Similarly, though it spoke in broad terms, the Court was evidently focusing primarily on the routine line-up and show-up procedures employed by the police to obtain evidence for use at trial. The Court was concerned both to enhance the fairness of such procedures and to expose to judge and jury any elements of unfairness or unreliability which might attend them. In these typical cases, where counsel had been retained and time was not a factor it could find 'no substantial countervailing policy considerations * * *against the requirement of the presence of counsel.'
>
> The present case, however, involves an immediate on-the-scene confrontation at 5 o'clock in the morning when there would necessarily be a long delay in summoning appellant's counsel, or a substitute counsel, to observe a formal lineup. Such delay may not only cause the detention of an innocent suspect; it may also diminish the reliability of any identification obtained, thus defeating a principal purpose of the counsel requirement."
>
> * * *
>
> "Balancing all the doubts left by the mysteries of human perception and recognition, it appears that prompt confrontations in circumstances like those of this case will 'if anything promote fairness, by assuring reliability * *.' This probability, together with the desirability of expeditious release

> of innocent suspects, presents 'substantial countervailing policy considerations' which we are reluctant to assume the Supreme Court would reject. We therefore conclude, with some hesitation, that Wade does not require exclusion of McCann's identification."

Russell after holding that the Sixth Amendment prohibition of Wade does not apply to prompt on-the-scene identifications, citing Stovall said (408 F2d at 1284):

> "There remains the question of whether the confrontation in this case 'was so unnecessarily suggestive and conducive to irreparable mistaken identification [that] appellant * * * was denied due process of law.'"

This Court stated in Russell (408 F2d at 1284):

> "...absent special elements of unfairness, prompt on-the-scene confrontations do not entail due process violations."

Applying the test in Russell, Appellant reviews here the record to establish that due process requires exclusion of the identification testimony "...which could and should have been obtained by procedures less conducive to unreliability." (408 F2d at 1285.)

The Complainant, Mr. Wagner, testified that when he arrived in the police car at 5th and I Streets, the Appellants were already in police custody (Tr. 29):

> "Q. Now, was the street full with people at the time, full of spectators? Were there spectators around?
>
> A. [By Mr. Wagner] No, I would say not many.
>
> Q. Were there many people there when you arrived?
>
> A. Well, I get the impression that there were about a million policemen. There seemed to be an awful lot of them."

(Tr. 30-31):

"Q. Were there any other suspects or people who might look like suspects standing around in this vicinity?

A. I didn't notice any.

Q. In other words, the only people present, isn't it true, were uniformed policemen and these three men [the Appellants]?

A. Yes, as best I recall, that is true."

(Tr. 32-33):

"Q. Mr. Wagner, you testified when you were originally accosted in the men's room, your glasses were thrown to the floor, is that correct?

A. Yes, sir.

Q. Were they broken, do you recall?

A. Yes, sir.

Q. You did not have your glasses on from that time on?

A. This is right, sir.

Q. You had no other glasses, right?

A. That is correct, sir.

Q. You made your original identification or your initial identification of these men while you were still in the patrol car? I believe you testified that those are the men?

A. Yes, sir, that is correct."

Defense counsel suggested a "...simple test to determine whether this witness can recognize from a reasonable distance or a distance at which he identified the three men...." (Tr.34). The Court questioned the witness on his ability to see (Tr. 33-34) and then denied the defense motion to exclude the identification relying on Russell (Tr. 35).

Crucial in the identification of the Appellants was the presence of one of the Complainant's coats (Tr. 19-20):

> "Q. What, if anything, did you say, and what, if anything, did you do when you first observed or saw these men on the corner of the street?
>
> A. Before we got to the light, I could see them perhaps from here to the other end of the room, and I said, 'Oh, there they are, all three of them.' One of them has my coat on right now."

Segregating the suspects, surrounding them with numerous uniformed officers, and leaving visible what was alleged to be the Complainant's coat, what could the police have done to make the identification more conducive to unreliability?

Compare the facts in Foster v. California 394 U. S. 440, 442-43 (1969) where the Supreme Court found the pre-indictment lineup violated due process:

> "Judgedby the [Stovall] standard this case presents a compelling example of unfair lineup procedures. In the first lineup arranged by the police, petitioner stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber. ...when this did not lead to positive identification, the police permitted a one-to-one confrontation between petitioner and the witness."
>
> * * *
>
> "The suggestive elements in this identification procedure made it all but inevitable that [the Complainant] would identify petitioner whether or not he was in fact 'the man.'"

In determining whether the identification could and should have been obtained by procedures less conducive to unreliability,

Appellant again cites Russell concerning the dangers of prompt on-the-spot identification (408 F2d at 1284):

> "...the viewer may have been emotionally unsettled by the experience of the fresh offence."

Ten or twelve minutes prior to the identification, the viewer had been pushed about by three men and robbed with a knife at his throat (Tr. 16, 18). During the robbery the witness's glasses were knocked off and broken (Tr. 32). Being deprived of his two coats during the January robbery, the witness testified he "was about froze to death" and "scared that I would probably catch a cold." (Tr. 31). Being roughed up, threatened with a knife, robbed, disrobed and exposed to winter's chill, and having his glasses knocked off and broken, it would be quite an understatement to say the witness was "emotionally unsettled" during the identification.

In light of the numerous factors in the identification conducive to unreliability, would there have been any difficulty in following a more reliable procedure? No.

The crime occurred on a weekday at 10:00 a.m.--and did not raise the time problem discussed in Russell[4/] where there would be difficulty in locating counsel or substitute counsel. The Complainant was retired and living in the District of Columbia (Tr. 10). There was no indication that the witness would not be available later for a formal lineup. There was no testimony

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4/ The crime in Russell occurred "at day-break". The Russell Court commented that the case (408 F2d at 1283-84): "... involves an immediate on-the-scene confrontation at 5 o'clock in the morning when there would necessarily be a long delay in summoning appellant's counsel, or a substitute counsel, to observe a formal lineup."

that the Complainant was physically injured in the robbery--the exigent circumstances of a critically ill complainant are absent here. Compare Stovall v. Denno, 388 U. S. 293, 302 (1967).

Indeed, the record is devoid of any reason why the Appellants could not have had a formal lineup, with counsel (or substitute counsel) present. At the lineup the Appellants would not be shown alone; the garments worn at the lineup would not be suggestive. Mr. Wagner would have had time to calm down, warm up from the cold, and have his glasses repaired.

The procedure followed here was unjustified and inexcusable. The Appellant's right to due process was violated. The identification testimony of the Complainant (and the police) should be excluded and this case remanded for a new trial.

B. The Appellant was not represented by counsel at his arraignment in violation of the Sixth Amendment and Rule 44(a) Fed. R. Crim. P.-- the indictment should be dismissed (Criminal Docket #264-69, page 1)

The Criminal Docket in #264-69, page 1, shows that the three Appellants were arraigned on March 7, 1969, before Chief Judge Curran. At the arraignment the Appellants were not represented by counsel. Each entered a plea of not guilty and the cases were referred for appointment of counsel.

The absence of counsel is a clear violation of Rule 44(a), Fed. R. Crim. P. Until recently, this Court's position has been that absence of counsel at arraignment is generally harmless where a plea of not guilty is entered--the burden was on the appellant to show actual prejudice as a condition precedent to

dismissal of the indictment, e.g., McGill v. United States, 348 F2d 791 (1965).

However, in United States v. Ridley, 412 F2d 1126, 1127, ftn. 2, (1969), this Court suggests that the Appellant need not show actual prejudice:

> "Lack of counsel at arraignment is symptomatic of the accused's not having counsel during other early stages of the case following indictment, and the Plan's requirement of counsel at arraignment was designed to assure the presence of counsel for other important purposes as well. That objective of the Plan [for furnishing representation for indigents] is not advanced by invariably requiring an appellant to show actual prejudice in respect of the arraignment in order to complain of the lack of counsel at that time."

Pursuant to Ridley, Appellant contends that the indictment should be dismissed.

C. The Complaint was not properly executed in violation of Rule 44(a) Fed. R. Crim. P.--the indictment should be dismissed (Complaint).

The Complaint was executed before a deputy clerk of the Court. Rule 3, Fed. R. Crim. P. which requires that the complaint be made "upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States." A deputy clerk does not meet the requirements of Rule 3; see 18 U. S. C. §3041. This Court in Gaither v. United States, 413 F2d 1061, 1076 (D. C. Cir. 1969) agreed that a deputy clerk cannot administer the oath on a complaint. However, in Gaither the Court held that this violation of Rule 3 is harmless in a warrantless arrest. The Court found that the necessity of properly executing the complaint applies only to

pre-arrest complaints; after the arrest, the complaint is a mere formality.

Appellant contends that if post-arrest complaints were to be treated differently--Rule 3 would have so provided. Indeed, in warrantless arrests the complaint is an essential element in the judicial process. Since there is no warrant, the complaint is generally the only document in the criminal record which sets forth the essential facts constituting the offense charged.

The complaint is then the crucial document in proceeding under Rule 5, Fed. R. Crim. P.:

> Rule 5(a) and (b)--the appearance before the Commissioner
>
> Rule 5(c)--the preliminary examination

Since the complaint was executed before a deputy clerk, it was never subject to review by a judicial or quasi-judicial officer as envisioned in Rule 3. Since there is no warrant, the judicial (or quasi-judicial) review in Rule 4 never occurs.

Combining the import of Rules 3, 4 and 5, it would appear that the occurrence of a warrantless arrest makes proper execution of the complaint essential to properly preserve the Appellant's rights.

The complaint violated Rule 3; the indictment should be dismissed.

V. CONCLUSION

Based on the foregoing, Appellant Barnes respectfully requests that this Court find:

A. The identification procedure violates due process of law and therefore exclude the identification testimony by the complainant and police and remand for a new trial;

B. The Appellants were arraigned without counsel, and therefore the indictment should be dismissed; and

C. The Complaint was not properly executed, and therefore the indictment should be dismissed.

Respectfully submitted,

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May 6, 1970

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Certificate of Service

I certify that I have this 6th day of May, 1970, served two copies of the foregoing brief on the U. S. Attorney by leaving copies in the Office of the U. S. Attorney, U. S. Courthouse, Washington, D. C.

Philip F. Hudock